



No. 83-1735

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

STATE OF OREGON
Petitioner,
v.

UNITED STATES OF AMERICA,
KLAMATH INDIAN TRIBE and
BEN ADAIR, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

Kim Jerome Gottschalk
Counsel of Record
Native American Rights
Fund
1506 Broadway
Boulder, CO 80302
Phone: (303) 447-8760
Counsel for Respondent
Klamath Indian Tribe

QUESTION PRESENTED

1. In a water rights adjudication wholly within the former Klamath Indian Reservation did the federal district court abuse its discretion by declaring the existence and priority of water rights based on federal law and deferring quantification of those rights to a subsequent state proceeding?

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT.....	8
A. The District Court Did Not Abuse Its Discretion.....	8
B. The Unique Facts of This Case Are Unlikely to Recur.....	27
CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases:

<u>Arizona v. San</u> <u>Carlos Apache</u> <u>Tribe of Arizona</u> <u>U.S.</u> , 77 L. Ed. 2d 837 (1983).....	9,10,13,17,21-22,24-25
<u>Colorado River Water</u> <u>Cons. Dist. v. United</u> <u>States</u> , 424 U.S. 800 (1976).....	3,9-10,12-14,18,21,23-25

Klamath Indian Tribe
v. Oregon Dept. of
Fish and Wildlife
729 F.2d 609 (9th
Cir. 1984).....8

Moses H. Cone Hospital
v. Mercury Const.,
460 U.S. _____, 74
L.Ed. 2d 765 (1983).....21,22,26

Provident Bank
& Trust Co. v.
Patterson, 390
U.S. 102, 112
(1968).....17

Will v. Calvert Fire
Ins. Co., 437 U.S. 655,
673 (1978).....11,13

Statutes:

28 U.S.C. §117.....25
28 U.S.C. §1362.....3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-1735

STATE OF OREGON, Petitioner

v.

UNITED STATES OF AMERICA
KLAMATH INDIAN TRIBE and
BEN ADAIR, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The United States commenced this
suit in federal district court on
September 29, 1975, by filing a
complaint against certain named
defendants plus "all other persons
claiming any right to the use of water

within the watershed of the Upper Williamson River as defined herein." (CR 1 at 3.) All of the defendants were believed to claim interests in lands within the former Klamath Indian Reservation and had acquired those interests directly, or from the United States as trustee for the Klamath Tribe or as trustee for individual members of the Tribe to whom lands had been allotted (CR 1 at 7). The United States sought a declaratory judgment to determine the relative rights of the defendants and the United States to utilize the surface and ground waters of the Williamson River watershed above the Kirk "reef", a natural rock formation downstream from Klamath Marsh. The complaint also sought an injunction barring use of

water in derogation of the rights of the United States (Id. at 8-9). The Klamath Tribe was allowed to intervene in the case as a plaintiff (CR 283) under 28 U.S.C. § 1362. The state of Oregon intervened as a defendant.

Certain defendants, relying upon Colorado River Water Cons. Dist. v. United States, (Akin) 424 U.S. 800 (1976), moved to dismiss in favor of a subsequent state administrative proceeding. On September 13, 1976, after extensive briefing, the district court held a lengthy hearing on the motions (CR 283). At the conclusion of the hearings, the court indicated that it would deny the motions, although no formal ruling was entered at that time (CR 283 at 62). Rather, the court directed the parties to

jointly prepare a pretrial order which, when entered on November 2, 1977, stated the court's decision to retain jurisdiction (CR 388-389).

The order concluded that, following entry of a declaratory decree, the State "will administer the adjudication, quantification, enforcement, and filing of water rights in accordance with its regular, normal and on-going process and authority under applicable statutes, and consistent with the decree entered herein." (Id. at 26-27.)

On September 27, 1979, the district court issued its opinion declaring the rights of the parties (CR 650). First, the court held that Article I of the 1864 Treaty, which recognized that the Indians could

continue to exercise their traditional hunting, fishing, trapping and gathering activities on the Klamath Reservation, confirmed an implied right to as much water as needed to sustain these rights, with a priority date of time immemorial (Pet. App. 20-22, 34). As the Termination Act preserved the Tribe's water rights, the Indians are entitled to as much water as they need to protect their hunting and fishing rights (Pet. App. 22). Second, the court ruled that Articles II to V of the Treaty, which encouraged adoption of agriculture and provided for allotments to individual members, impliedly reserved an agricultural water right and that when parcels were allotted to individual Indians, the allottees and their

Indian successors acquired the right to use a portion of the tribal water essential for cultivation, with an 1864 priority date (Pet. App. 22, 23, 34). The court further held, that should a conflict arise, the Article I water rights for hunting and fishing purposes prevail over the agricultural treaty water rights (Pet. App. 23). As to the water rights of non-Indian purchasers of allotted lands, the court declared that a non-Indian successor to an Indian allottee acquires an appurtenant water right to water for the actual acreage under irrigation at the time he acquires title plus water for such additional lands as he may with reasonable diligence place under cultivation, all

with an 1864 priority date (Pet. App. 28-32, 35).

The court declined to rule upon the United States' claims regarding its water rights for wildlife refuge and forest lands within the boundaries of the former Klamath Reservation.

The court stated that it was unnecessary to reach those questions, as the Indians' rights to streamflows to protect their hunting and fishing rights would be adequate to protect the United States' rights (Pet. App. 20). As to national forest lands "outside of the former reservation" the court held that the United States' reserved rights were limited to such waters as were unappropriated when the forest lands were reserved and which are essential for timber production

and conservation of water flow (Pet. App. 26-28).1/

On appeal, the Ninth Circuit Court of Appeals, affirmed the district court's rulings on the merits in most respects and specifically affirmed the court's decision to reach the merits. The state's petition here challenges only the district court's discretionary decision to exert jurisdiction to a limited extent.

REASONS FOR DENYING THE WRIT

- A. The District Court Did Not Abuse Its Discretion.

The state's petition argues that this Court should grant certiorari

1/While the district court opinion characterized some of the land as adjacent national forest land, that land apparently had been wrongfully excluded from the Klamath Reservation. See Klamath Ind. Tribe v. Or. Dept. of Fish and Wildlife, 729 F.2d 609 (9th Cir. 1984).

because the federal district court decision (upheld by the Ninth Circuit Court of Appeals) to proceed to the merits of the federal law issues in this action rather than defer to subsequent state administrative proceedings was so out of line with this Court's pronouncements on the subject that this Court should exercise superintending control. But the decision of the district court is actually in harmony with this Court's pronouncements in Colorado River Water Cons. Dist. v. United States ("Akin"), 424 U.S. 800 (1976) and Arizona v. San Carlos Apache Tribe of Arizona (San Carlos), ___ U.S. ___, 77 L. Ed. 2d 837 (1983) so there is no reason for this Court to grant review.

Petitioner has not argued to this Court that the federal courts'

decisions on the merits are erroneous. Its argument is rather that this Court should review for abuse of discretion, a decision to exercise jurisdiction; that a judgment rendered by a federal court and affirmed by the Ninth Circuit Court of Appeals should be undone; that all the effort expended by the parties and the federal courts should be nullified; and that matters should be turned over to a state administrative proceeding which in over eight years has not proceeded beyond the investigatory stage, and which may never proceed beyond the investigative stage. Nothing in Akin or San Carlos remotely requires such a waste of judicial resources.

This Court in Akin viewed the question to be the proper exercise of

jurisdiction when state and federal courts have concurrent jurisdiction, governed by considerations of "wise judicial administration." 424 U.S. at 817. The Court emphasized "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id.* "Given this obligation, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than circumstances appropriate for abstention." *Id.* at 817-18. The decision to defer to state proceedings or not is committed to the sound discretion of the district court. Will v. Calvert Fire Ins. Co., 437 U.S. 655, 664 (1978), (Pet. App. 48-49).

The federal court's obligation to exercise its jurisdiction was, on the record in Akin, found to conflict with several competing considerations: the policy of the McCarran Amendment to avoid piecemeal or duplicative litigation, the absence of any proceedings in the District Court beyond the motion to dismiss, the extensive involvement of state water rights, the extensive involvement of the Government in other divisions of the Colorado Water Court, and the distance between the federal court's headquarters in Denver and the State Water Court at Durango. Id. at 819-20. The Court warned that the case might be different if any of these factors were altered. Id. at 820. The policy of avoiding

duplicative litigation has been recognized as the most important factor. Id. at 819. The other factors have been characterized as secondary. Id.; Will v. Calvert Fire Ins. Co., 437 U.S. 655, 673 (1978) (dissenting opinion).

The present case is not governed by the result in Akin because the factors emphasized there are each presented very differently on this record than in Akin. We shall discuss each of them.

a. Akin relied primarily on the policy of the McCarran amendment to avoid piecemeal or duplicative proceedings. As expressed in this Court's opinion in San Carlos, *supra*, the concern was that federal proceedings:

. . are likely to be duplicative and wasteful, generating additional litigation through permitting inconsistent dispositions of property. Colorado River, 424 U.S., at 819. Moreover, since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issues first -- a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decision-making by either forum.

Even before judgment was entered, there was little likelihood of duplicative litigation or racing to the courthouse here. This is so

because of the nature of the subsequent Oregon proceeding which began with an administrative investigation to ascertain whether a determination of rights and ultimately a resort to state court is even necessary. 539.020 ORS.

There was no race here to see who could litigate the legal question of the existence and nature of federal rights first. In fact, nothing has yet happened in the state administrative proceeding on the merits of any issue. And as pointed out, the director, under Oregon law, could decide not to proceed to the merits.

The state attempts to contrast the "comprehensive" nature of the state proceeding with the limited

nature of the federal proceeding. This is said to create a problem because those in any state proceeding will not be bound by the federal proceeding, and duplication will result. Yet Petitioner admits that the state "proceeding" does not include areas previously adjudicated (Pet. Brief at p. 5 and fn. 3). It is not explained why the federal decree presents any more of a problem than those areas previously adjudicated under the state procedure and which involve parties not a part of the present state proceeding.

Also of importance is the fact that those rights decreed to the Tribe are essentially nonconsumptive (Pet. App. 78), and downstream users can only benefit from the existence of such tribal rights. The chances for

disagreement between upper and lower basin users is thus much less than is normally the case in a typical state proceeding. Thus, the federal decree in this case may simply be incorporated into the state proceeding with no duplication of effort.

All of the concerns this Court expressed in San Carlos are moot in this case because the federal court has rendered a judgment on many complex federal issues, and none of the practical or theoretical concerns ever materialized.^{2/}

^{2/}There is an "interest in preserving a fully litigated judgment (that) should be overborne only by rather greater opposing considerations than would be required at an earlier stage when the plaintiffs' only concern was for a federal rather than a state forum." *Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102, 112 (1968).

It is Petitioner's path that would result in duplication(Pet App. 50). It asks this Court to allow it to relitigate the federal issues before the Director and the state's courts. It requests this even though it does not challenge the lower court rulings on the merits.

b. Another of the Akin factors was the lack of any District Court proceedings beyond hearing the motion to dismiss. In the instant case the District Court has conducted several years of proceedings on the merits leading to resolution of numerous complex federal issues (none of which are here challenged on their merits). Admittedly, the motion to dismiss antedated these proceedings; when they were filed there had been few

proceedings below. But the state proceedings are only in an investigatory stage and under O.R.S. 539.020, once the investigatory stage is completed, the Director then decides whether to proceed with a determination of rights.

The Ninth Circuit opinion accurately describes the nature and status of the state process.

Some months after the United States filed its suit in federal court, however, the Oregon State Water Resources Director issued a notice announcing that on Sept. 1, 1976, he would "begin an investigation of the flow and use of waters of the Klamath River and its tributaries ...". Under the Oregon scheme for adjudicating water rights, such a notice of investigation is one of the prerequisites to a state court

determination of water rights. In addition, the Water Resources Director, after investigation, must decide that the "facts and conditions justify" making a determination of water rights. See Or. Rev. Stat. 539.020 (1981). At the time the district court ruled on defendants' motion to dismiss the federal suit, none of the preliminary steps in the Oregon adjudication had been completed.

Of equal or greater importance to our decision in this case, however, is the fact that even at this time, some seven years after the Oregon Water Resources Director issued his notice of investigation, the state determination of water rights in the Klamath Basin has not proceeded beyond administrative investigation. Indeed, the information-gathering stage of the procedure is not yet complete.

Thus, the point has not yet been reached when the decision has been made that there will be a determination of water rights. Under these circumstances, deference to the state proceeding is not required by Akin or San Carlos.

c. A third factor involved in Akin was the preponderance of state law issues. This Court in San Carlos acknowledged that where rights primarily depend in federal law, that is an important factor to weigh. ____ U.S. ____, 77 L.Ed. 2d at 855. In Moses H. Cone Hospital v. Mercury Const., 460 U.S. ____, 74 L.Ed. 2d 765 (1983), the Court noted that the state - versus - federal law factor was of ambiguous relevance in Akin, because of the McCarran Amendment and because,

while the rights of the tribes and the federal government were based on federal law, the bulk of the litigation would necessarily revolve around the state law rights of the nonfederal parties. 74 L.Ed. 2d at 784, 785. Most of the rights at issue in San Carlos were also based on state law. Here, the only rights determined were those based on federal law (Pet.App. 54-55). Even the rights of non-Indian successors to allottees depend on federal law. Generally, the presence of federal law issues must always be a major consideration weighing against surrender of federal court jurisdiction to state courts. Moses H. Cone, supra, 74 L.Ed. 2d at 786. State interests here are adequately accommodated because the

court ordered quantification in state proceedings.

d. Another factor in Akin was that Colorado had, by enactment of a recent statute, embarked on an attempt to adjudicate comprehensively the claims of all water users throughout the State. When Akin was filed the state effort was well under way and the United States was already participating in water rights adjudications in three of the seven water districts in the State. And, although the United States had not yet been brought into the suit, a water adjudication involving the same district as was involved in Akin was already underway in state court when the federal government filed its complaint in the federal court. Akin, *supra*, 424 U.S. at 806. Here, by

contrast, Oregon makes no attempt to claim that it was, on its own initiative, moving forward in such a comprehensive manner. Compare also Montana's comprehensive scheme in San Carlos 77 L.Ed. 2d at 848. The state here began an administrative investigation after the federal government filed its complaint and has in fact moved forward at a snail's pace.^{3/}

e. Akin mentioned the 300 mile distance between Denver and Durango. Petitioner does not mention this because it was not a serious factor here. To the extent that this factor

^{3/}It is difficult to comprehend that the state could not as it argues, (Pet. 6) proceed before 1976 because its law of abandonment did not apply to the Tribe's rights then. Abandonment has nothing to do with an initial determination of rights.

was more than a make weight in Akin,^{4/} it must be taken to focus on the detailed proceedings needed to quantify water rights. The declaratory proceedings actually conducted in the District Court here did not involve any inefficiencies of location. Quantification was deferred to the Director (who, in any case, is in Salem, not Klamath Falls).

There are two additional factors present in this case which justify the district court's actions below.

First, this Court in San Carlos noted that the fact that tribes are

^{4/}It may be doubted whether the Court meant this factor to be significant. As the dissent pointed out, Durango is a statutory place of hearing for the Colorado federal court. 424 U.S. at 823 n.6. Similarly, Klamath Falls is a place of hearing for the Oregon court. 28 U.S.C. § 117.

plaintiffs may make a difference. 77 L.Ed. 2d at 849. As the Ninth circuit Court of Appeals noted in this case, "Once the Tribe intervened, in light of the district court's limited exercise of jurisdiction, the case presented, for all practical purposes, a suit to adjudicate Indian water rights on behalf of an Indian Tribe." (Pet. App. at 55.) This factor argues strongly in favor of federal jurisdiction.

Finally, given the investigative nature of the state proceeding and the uncertainty it will ever reach the state court, this may not be the type of proceeding to which a federal court may be required to defer. See Moses H. Cone Hospital v. Mercury Const. Co., 460 U.S. ____, 74 L.Ed. 2d 765, at 771-2 (1983) (doubts as to

jurisdiction sufficient reason to deny deference to state proceedings).

B. The Unique Facts of This Case Are Unlikely to Recur.

This case presents facts unlikely to recur. All parties, including non-Indian land owners, claimed federal water rights. The issues were wholly governed by federal law and the area involved is entirely comprised of a former Indian reservation. The bulk of the water rights declared is nonconsumptive. Given the unique circumstances of the federal district court's exercise of discretion, review by this Court would not serve any broad interest.

Conclusion

For the reasons stated, the writ
should be denied.

Respectfully submitted,

Kim Jerome Gottschalk
Native American Rights
Fund
1506 Broadway
Boulder, CO 80302
Phone: (303) 447-8760
Counsel for Respondent
Klamath Indian Tribe

(THIS PAGE INTENTIONALLY LEFT BLANK)